

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – August 26, 2005

**IN THE MATTER OF** sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

**-and-**

**IN THE MATTER OF** an appeal filed by Barbara A. Higgins with respect to Amending Approval No. 46972-00-02 issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: *Higgins v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (26 August 2005), Appeal No. 04-054-D (A.E.A.B.).

**BEFORE:**

Dr. Steve E. Hrudehy, Chair.

**WRITTEN SUBMISSIONS:**

**Appellant:**

Ms. Barbara A. Higgins.

**Approval Holder:**

Cardinal River Coals Ltd., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

**Director:**

Mr. Larry Williams, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

## EXECUTIVE SUMMARY

On July 29, 2004, the Director, Central Region, Regional Services, Alberta Environment, issued an amending approval under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. for the opening up, construction, operation, and reclamation of the Cheviot Creek coal mine near Cadomin, Alberta.

The Board received a Notice of Appeal from Ms. Barbara Higgins.

The Director raised a preliminary motion that Ms. Higgins did not file a valid Statement of Concern, a prerequisite to filing a valid Notice of Appeal, and therefore, the appeal should be dismissed.

The Director initially rejected the Statement of Concern on the basis Ms. Higgins did not live or own property in the area of the coal mine. In her Statement of Concern, Ms. Higgins did mention she had a home in the area, and this was confirmed in her submissions. She believed she was directly affected by the project. The Director argued the information provided by Ms. Higgins was insufficient to determine her concerns and how she was affected by the proposed project. After reviewing the submissions and the relevant sections of the Director's record, the Board determined the information provided in Ms. Higgins' letters to the Director was sufficient to fulfill the requirements of a Statement of Concern for the purposes of filing an appeal. The Board made no determination as to whether Ms. Higgins is directly affected by the project.

The Director's motion to dismiss the appeal on the basis of not filing a valid Statement of Concern is denied.

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## **I. BACKGROUND**

[1] On July 29, 2004, the Director, Central Region, Regional Services, Alberta Environment, (the “Director”), issued Amending Approval No. 46972-00-02 (the “Approval”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), to Cardinal River Coals Ltd. (the “Approval Holder”) for the opening up, construction, operation, and reclamation of the Cheviot Creek coal mine near Hinton, Alberta.

[2] On September 3, 2004, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Ms. Barbara A. Higgins (the “Appellant”) appealing the Approval.

[3] On September 8, 2004, the Board wrote to the Appellant, Approval Holder, and Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and Director of the appeal. The Board also requested the Director provide the Board with a copy of the documents relating to this appeal (the “Record”), and the Participants provide available dates for a mediation meeting or hearing. The documents relating to Alberta Environment’s communication with the Appellant were received on October 19, 2004.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative.

[5] The AEUB stated it had not dealt with the specific appeal, but it “...did receive an application for the construction and operation of the Cheviot Coal Mine and Processing Plant from Cardinal River Coals Ltd. The [A]EUB along with the Canadian Environmental Assessment Agency held two joint hearings in 1997 and 2000 into the application.” The AEUB provided copies of Decision 97-08, Decision 2000-59, and Permit No. C2003-4.

[6] On September 13, 2004, the Director raised the issue of whether or not the Appellant had properly submitted a Statement of Concern pursuant to section 73 of EPEA.

[7] On September 22, 2004, the Board set a schedule to receive submissions from the Participants to answer the following questions:

- “1. Did Ms. Higgins file a statement of concern with Alberta Environment in relation to Amending Approval No. 46972-00-02 before she filed her Notice of Appeal with the Environmental Appeals Board?
2. If a statement of concern was not filed with Alberta Environment, Ms. Higgins is asked to provide the Board with the reason.”

[8] The Board received the Participants’ submissions between September 30, 2004, and November 15, 2004. As the Director’s motion only referred to the adequacy of the Statement of Concern filed, the Board did not receive submissions on the directly affected status of the Appellant, and therefore, these reasons will not address that issue.

## **II. SUBMISSIONS**

### **A. Appellant**

[9] The Appellant stated she did file a Statement of Concern with the Director on May 5, 2004, which was within the requisite time frame. She explained she faxed it to the Director on May 5, 2004, and she did not hear from the Director until June 18, 2004, when he advised that his reply dated May 12, 2004, had been sent to the wrong address. She stated she received a cover letter dated June 10, 2004, but not the attachment described, which was the original letter dated May 12, 2004. The Appellant explained she called Mr. Ryan Puhmann of Alberta Environment to advise of the missing attachment. She stated she received the attachment via email sent to a friend. The Appellant stated the Director requested that she submit more information by June 30, 2004.<sup>1</sup>

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<sup>1</sup> See: Appellant’s submission, dated November 15, 2004, in which she states:

“I understood that to mean that I write more, expanding the facts given with more information of my experience and knowledge of the area. That was what I attempted to do. By June 29 I had written 7 pages in which I expand on the points made in my Statement of Concern.... I was not finished with my reply because it is difficult to discern what would be acceptable to Mr. Williams.”

[10] According to the Appellant, given her understanding of what was being requested, she found the deadline to be short, which was a hardship for her. The Appellant explained she consulted briefly with a lawyer on June 29, 2004, who agreed to talk with her "...the following week after the long weekend. He also suggested that I ask for an extension since I had been given only 12 days to reply to the Director's original letter."<sup>2</sup> She explained her faxed written request for a 9-day extension was refused outright on June 30, 2004, but on July 2, 2004, the Director offered her three additional days, which she refused.

[11] The Appellant stated the Director rejected her Statement of Concern based on her return address being outside the area of environmental impact. She admitted she had not given the legal description of her Cadomin property in her Statement of Concern, but she had mentioned her home on the lower bench of Leyland Mountain and her stewardship of the McLeod Valley for over 70 years. She stated she was well known by the Approval Holder, and the former management had kept her informed of the Approval Holder's plans even after she moved to Edmonton. The Appellant explained it never occurred to her that she was not on the Approval Holder's list of stakeholders.

[12] The Appellant stated her first impression of the Director's May 12, 2004 letter was that he did not read her Statement of Concern and did not look beyond her return address. She argued that section 73 of EPEA "...does not say that a mailing address outside of the area in question constitutes a basis for rejection."<sup>3</sup> She explained that, in response to the Director's request to provide details of her concerns and whether she owned property in the area of the proposed project, she attempted to expand on her experience and knowledge of the area. She stated she had difficulty discerning what would be acceptable to the Director given his rejection of her original Statement of Concern and, therefore, had difficulty in finishing her reply within the time limit provided by the Director. She stated she felt she had expressed her concerns in the Statement of Concern filed on May 5, 2004.

[13] The Appellant stated she telephoned Alberta Environment on June 18, 2004, and advised Mr. Ryan Puhlmann of Alberta Environment that she owned property in Cadomin, and she offered to provide legal details. She argued that even though the ordinary citizen is

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<sup>2</sup> Appellant's submission, dated November 15, 2004.

encouraged to express their concerns of environmental matters, "...the department and the process favour development, not preservation."<sup>4</sup>

[14] The Appellant submitted she filed a Statement of Concern in accordance with the rules and regulations on May 5, 2004.

**B. Approval Holder**

[15] The Approval Holder argued that, "...despite numerous opportunities and requests to do so, Ms. Higgins did not elaborate on her letter dated May 2, 2004, on how she is directly affected by the Approval."<sup>5</sup> Therefore, according to the Approval Holder, the Appellant's letter cannot be considered a Statement of Concern and she is not entitled to file a Notice of Appeal.

[16] The Approval Holder requested the appeal be dismissed.

**C. Director**

[17] The Director stated the filing of a Statement of Concern is a condition precedent to filing a Notice of Appeal.

[18] The Director explained the letter sent by the Appellant dated May 2, 2004, listed an Edmonton address and did not indicate whether she owned any property that would be affected by the application. He stated he screened the letter and responded to the Appellant, indicating it did not appear she was directly affected. He stated he attempted to clarify this and provided her the opportunity to rebut the presumption that she did not meet the requirements of being directly affected. He stated his letter was returned undeliverable, as his office had incorrectly addressed it. The Director explained he sent a new cover letter on June 10, 2004, with the original letter and explained the error and gave a new timeline to receive any clarifying information. He stated the Appellant contacted his office on June 18, 2004, speaking with Mr. Ryan Puhlmann, as the original letter was not enclosed as indicated. He explained he then

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<sup>3</sup> Appellant's submission, dated November 15, 2004.

<sup>4</sup> Appellant's submission, dated November 15, 2004.

<sup>5</sup> Approval Holder's submission, dated October 22, 2004.

attempted to email the letter to her via a friend, and it was hand delivered by one of his staff on June 21, 2004. The Director stated the Appellant contacted his office on June 28, 2004, confirming she would be submitting further information. According to the Director, the Appellant contacted his office again on June 30, 2004, asking for additional time to prepare her submission, but she also indicated she would not provide any additional information. He explained that, if she provided her request in writing, an extension to July 2, 2004, could be granted. He stated in response to her written request, he extended the deadline to July 5, 2004. The Director explained he wrote to the Appellant dismissing the Statement of Concern on July 8, 2004, as no response had been received as to the nature of her concerns.

[19] In response to the Appellant's submission that she could have been contacted by telephone to obtain the information, the Director explained they need formal documentation and it was appropriate to make a written request for the information. He further explained anecdotal information that he has no knowledge of, such as the Appellant's relationship with the Approval Holder, cannot sustain a finding of being directly affected. The Director stated the communication from the Regulatory Approvals Centre of Alberta Environment was "...a courtesy notice that was issued to those who, notwithstanding they were not directly affected, had indicated an interest in the application."<sup>6</sup>

[20] The Director argued he did not receive any information that would allow him to determine the Appellant was directly affected by the application. Therefore, according to the Director, the Appellant did not file a valid Statement of Concern, and the condition precedent to filing a Notice of Appeal has not been met.

[21] The Director submitted the appeal must be dismissed.

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<sup>6</sup> Director's submission, dated October 18, 2004.

### **III. DISCUSSION**

#### **A. Legislation**

[22] The relevant sections of the legislation regarding the submission of Statements of Concern and Notices of Appeal are as follows.

[23] Section 91(1) of EPEA stipulates who may file a Notice of Appeal:

“A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted
  - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director’s decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2)....”

[24] Therefore, under section 91, a Notice of Appeal can only be accepted if the person previously filed a Statement of Concern and is directly affected. The Board notes the directly affected status of the Appellant is not an issue being considered in this decision.

[25] Section 73 of EPEA states:

- “(1) Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person’s concerns with respect to the application or the proposed amendment, addition, deletion or change.
- (2) A statement of concern must be submitted within 30 days after the last providing of the notice or within any longer period specified by the Director in the notice.”

[26] Section 95(6) of EPEA provides:

“Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter

before the Board to any persons who the Board considers should be allowed to make representations.”

[27] This section of EPEA provides the Board with broad powers to determine who shall be heard in an appeal, but it also must remain within the constraints determined by the rules of natural justice.

## **B. Discussion**

[28] As the Board discussed in *Ouimet*,<sup>7</sup> the Board is not bound by the decision of the Director with respect to whether or not to accept a Statement of Concern. In *Ouimet* the Board explained the role of the Statement of Concern in the approval process:

“The Board notes that the Director accepted Ms. Ouimet’s Statement of Concern on the basis that in his view she was directly affected. As will be discussed shortly, the Board does not share the Director’s view that Ms. Ouimet is directly affected – the Director’s decision does not bind the Board. In making this determination, the Board is *not* of the view that the Director’s decision to accept Ms. Ouimet’s Statement of Concern, at that stage of the process, was incorrect. We believe the Director’s more inclusive approach to directly affected, for the purposes of his decision, is entirely appropriate. In fact, it is to be encouraged and is in keeping with section 2(d) of the *Water Act*.

The Board notes that the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director’s decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision. This purpose is properly reflected in the ‘Policy on Acceptance of Statements of Concern (1997).’ This policy, established by then Assistant Deputy Minister Al Schulz, states: ‘... considerable judgment will have to be exercised in determining what constitutes a valid Statement of Concern and where there is any doubt the concern should be considered a Statement of Concern.’”<sup>8</sup> (Emphasis in the original.)

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<sup>7</sup> *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D (“*Ouimet*”).

<sup>8</sup> *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D at paragraphs 23 and 24. See: *Graham v. Alberta (Director, Chemicals Assessment and Management, Environmental Protection)* (1997), 22 C.E.L.R. (N.S.) 141 (Alta. Q.B.) and (1997), 23 C.E.L.R. (N.S.) 165 (Alta. C.A.); and *Kostuch v. Alberta (Director,*

[29] As discussed in *Ouimet*,<sup>9</sup> the Board is of the view the Director's decision-making process should be more inclusive. The Board considers it invaluable to have the Director receive as much input as possible at the Statement of Concern level. It is better to err on the side of inclusion, and the concerns expressed in the Statements of Concern should be considered whenever possible, as the issues raised could be valuable in drafting the approval. A Statement of Concern provides the Director with additional information upon which he can make a better decision.

[30] From this starting point, the Board must look at the Statement of Concern filed by the Appellant, and rejected by the Director, to determine if it was sufficient to form the basis of filing the Notice of Appeal.

[31] What is at issue here is what constitutes a valid Statement of Concern. There are no specifics in the legislation of what must be included in order to have the Director accept it as valid, so the Board must consider what is the purpose of filing a Statement of Concern. The purpose of filing a Statement of Concern is twofold. First, it provides the Director with the filer's input into the decision that the Director must make. Second, the filing of a Statement of Concern preserves the filer's right to appeal. Both of these rights are contingent on a Statement of Concern being filed and being filed on time.

[32] The Board understands the Director reviews all Statements of Concern, even those filed by persons who are not directly affected, in order to appreciate the concerns of Albertans and the Board encourages the Director to continue this practice. As one of the purposes of Statements of Concern is to assist the Director to make the best possible approval, the Board encourages the Director to be more inclusive than exclusive, but this does not mean the Director has to accept all Statements of Concern filed as being valid. He still has the discretion to accept or reject the Statements of Concern based on specific criteria, including proximity to the proposed project. To assist the Director in making appropriate approval conditions, a Statement of Concern must contain specific information, including the name,

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*Air and Water Approvals Division, Environmental Protection*) (1997), 21 C.E.L.R. (N.S.) 257 (Alta. Q.B.).

<sup>9</sup> *Ouimet et al. v. Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment re: Ouellette Packers (2000) Ltd.* (28 January 2002), Appeal No. 01-076-D.

address, and contact information of the filer, a clear indication of the approval or licence application that is of concern, and how the filer is potentially directly affected by the proposed project. When the Director determines directly affected status of an appellant, he may consider proximity to a project as one of the indicators for standing. But it is also important to note that proximity is not the only factor that is determinative in finding a person directly affected or not.

[33] A Statement of Concern should also indicate the person's specific concern with the proposed project and how it will affect the person. Usually, broad, general statements, such as "I am concerned about air pollution in the Province," are insufficient to find it a valid Statement of Concern. There must be some specific connection to the proposed project. From there, the Statement of Concern should include how the specific environmental effect will affect the person directly. The clearer the connection between the environmental effect and the effect on the person, the stronger the Statement of Concern will be and the more clearly the filer's specific concerns will be able to assist the Director in making a better approval decision.

[34] In this case, the Appellant's Statement of Concern expressed concern about the movement "...of haul trucks along the edge of Cadomin just above my home on the lower bench of Leyland Mountain." The Appellant is justified in assuming that she had made it clear that she owned a home near the development. If the Director needed specific details on this matter for the purposes of accepting the letter as a valid Statement of Concern, he should have asked specifically for such details. However, the Director's request for more information, which ignored the statement in the Appellant's letter, created the basis for the Appellant to misunderstand the extent of his request for additional information. Given that he indicated in his request for more information he was dismissing the Appellant's letter as being a valid Statement of Concern unless she provided details as to why she was directly affected, the Appellant made a reasonable inference that substantial additional information was being requested.

[35] Based on the Record provided, it is clear to the Board that the reason the Director did not accept the Statement of Concern was that he believed she did not have property in the area.<sup>10</sup> The Board accepts the information that the Appellant owns property in the area near the project.

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<sup>10</sup> See: Director's letter to Appellant, dated May 12, 2004, in which he states:

[36] The Director stated he gave the Appellant the opportunity to rebut the presumption that she did not meet the requirements of being directly affected. The problem arose from a series of miscommunications, starting with the failure to recognize the Appellant's reference to her home in Cadomin. This led to a failure to request specific details, such as the legal land description of her property that would have allowed the Director to verify her property ownership. The Appellant perceived the Director's request for more details to justify being directly affected as one which, if not satisfied, would result in rejection of her Statement of Concern. This perception by the Appellant made the Director's request seem much more onerous than the Director may have intended. This misunderstanding, in turn, led to misunderstanding about how much additional time might be reasonable to allow the Appellant to respond.

[37] Although in the Statement of Concern the Appellant raised general environmental issues, such as displacement of animals, drought, and global warming, she also did raise more specific issues. The Appellant raised the issues of noise, dust, and the movement of haul trucks along the edge of Cadomin. Although not drawing the line specifically between these issues and how they affect her, it would have been reasonable to have the Director ask her specifically how she would be affected at her Cadomin residence.

[38] Alberta Environment has established public involvement principles that include being inclusive (providing people with the opportunity to be meaningfully involved in matters that affect them); providing people with a reasonable period of time to participate; and flexibility to adapt the public involvement process to meet people's needs.<sup>11</sup> Based on these principles, the Director is expected to be flexible when the occasion arises and he needs to be inclusive. Providing reasonable time to provide input, one of the identified principles, was not exemplified in this case given the documented communication problems that occurred. The Board does not expect the Director to grant extensions in all circumstances, but he should consider the circumstances carefully on a case-by-case basis and be willing to show the flexibility identified

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"Your mailing address indicates that your place of residence is outside the area of environmental impact associated with this facility. On this basis, you will not be considered as directly affected and your submission will not be considered a statement of concern."

<sup>11</sup> See: Alberta Environment website online:

[http://www.gov.ab.ca/env/consultations/pubs/AENV\\_Public\\_Involvement\\_Principles.pdf](http://www.gov.ab.ca/env/consultations/pubs/AENV_Public_Involvement_Principles.pdf) (date accessed: July 13, 2005).

in the public participation principles, particularly when communication errors by his staff have become evident. The Director did grant an extension in this case, but the misunderstanding about how much information he required interfered with achieving the desired resolution.

[39] In his submission, the Director referred to a number of extensions being granted, and the Approval Holder referred to numerous opportunities and requests of the Appellant to provide additional information. Neither reference is accurate in their inferences with regard to the Appellant. Most of these extensions were a result of Alberta Environment's errors, such as addressing the letter incorrectly and failing to provide the attachments. These extensions cannot be attributed to the Appellant. She made one request for an extension, in writing as required by the Director, on June 30, 2004. The Appellant's request for an extension arose from consulting legal counsel, who on June 29 advised her to request a 9-day extension because of not being able to meet with her until the week of July 5. She had talked to the Director on June 29 to ask for an extension, but the Director did not consider the request until he had it in writing on June 30. The Board appreciates the position of the Director in that he requires requests such as time extensions be in writing, but the circumstances in this case cannot be considered as more than one request for an extension. The Approval Holder's inferences about numerous opportunities being provided to the Appellant reflect an inadequate appreciation of what transpired.

[40] As the basis stated by the Director for rejecting the Appellant's Statement of Concern was that she did not own property in the vicinity of the Project, it is clear from the submissions provided that this basis is not supported. Therefore, the Board denies the motion of the Director to dismiss the appeal on the grounds the Appellant did not file a valid Statement of Concern.

#### **IV. CONCLUSION**

[41] The Board finds the Appellant filed a Statement of Concern with sufficient information to be accepted by the Director and to be valid for the purpose of filing an appeal. Therefore, the Board denies the motion by the Director to dismiss the appeal on the grounds a valid Statement of Concern was not filed.

[42] The Board has not made a determination on the directly affected status of the Appellant. The motion before the Board was limited to the adequacy of the Statement of Concern filed. The issue of whether or not the Appellant is directly affected must still be determined. Therefore, the Board will set a schedule to receive submissions from the Participants on whether the Appellant is directly affected by the project.

Dated on August 26, 2005, at Edmonton, Alberta.

*“original signed by”*

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Dr. Steve E. Hrudehy  
Chair